No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellant originally filed this action for declaratory relief in the Superior Court of California. Thereafter, appellee had the case transferred to The District Court of the United States, Southern District of California, Central Division, on the ground of diversity of citizenship, because while plaintiff was a citizen of California, the defendant's state of incorporation was Connecticut.

After such transfer, appellant filed an Amended Complaint in which it pleaded certain matters more specifically and sought declaratory relief as to the controversy concerning appellee's liability under its forgery bond. Subsequent to this, appellant filed an amendment to such

Amended Complaint wherein a Paragraph IIA was added to include the essential allegations of jurisdiction. In that amendment it was alleged that jurisdiction was conferred by Section 1332(1) of the Judicial Code (Title 28, U. S. C. A.), by reason of diversity of citizenship and because the amount in controversy exceeded $3,000.00. It was further alleged that the remedial statutes which were applicable were Sections 2201 and 2202 of the Judicial Code. (Title 28, U. S. C. A.) These sections empower the court to grant declaratory relief in controversies such as the one involved herein. Section 2202 also empowers the court to grant such necessary and proper relief upon its declaratory decree in order to render complete justice in the litigation. It has been held that this section empowers the court to direct a money recovery pursuant to the declaratory relief judgment.

See:

Texas Steel Mfg. Co. v. Seaboard Sur. Co. (C. A. Tex.), 158 F. 2d 90;

Goldsmith Metal Lath Co. v. Milcon Steel Co. (D. C. Del.), 53 Fed. Supp. 778;

Damko v. Shell Oil Co. (D. C. N. Y.), 115 Fed. Supp. 886.

Although the action was originally filed under the state declaratory relief statutes (Code Civ. Proc., Sec. 1060), it appears that, once the case was properly removed to the federal court, the federal statutes on declaratory relief should govern because these are procedural matters, and the declaratory relief statutes are precedural in nature.

See:

Aetna Life Ins. Co. v. Howarth, 300 U. S. 227, 57 S. Ct. 461 at 463;

New Amsterdam Casualty Co. v. Berger (D. C. Mich., 1945), 59 Fed. Supp. 994 at 995;

Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667 at 671, 70 S. Ct. 876 at 879;

West Pub. Co. v. McColgan (C. C. A. 9th), 138 F. 2d 320 at 324;

National Valve & Mfg. Co. v. Grimshaw (C. C. A. 10th), 181 F. 2d 687;

Borchard on Declaratory Judgments (2nd Ed.), at p. 231.

Jurisdiction of this appeal is conferred by Section 1291 of the Judicial Code (Title 28, U. S. C. A.), in that the judgment appealed from is a final decision of the District Court above mentioned.

Statement of the Case.

This action was instituted for the purpose of obtaining a declaratory judgment concerning the liability of appellee under a forgery bond which it had issued to appellant prior to the forgeries hereinafter described. The bond contained four riders, one of which was the one under which the liability asserted by appellant herein was assumed by the appellee. (Rider "D".) This rider recited that the bond was extended to cover:

> "Any loss (1) through accepting, cashing or paying forged or altered checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds, certificates of deposit, letters of credit, warrants, money orders, or orders upon public treasuries, or any of said instruments bearing forged

endorsements, acceptances or certifications, or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, drafts, acceptances, orders, receipts, letters of credit, warrants or certificates, or (3) through transferring, paying, or delivering any funds or property or establishing any credit or giving any value on the faith of any written instructions or advices, directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution, . . ." [R. 30-31.]

Subsequent to the execution and delivery of the bond* and the riders, and on the 2nd day of April, 1954, appellant paid out $30,000.00 in currency to one Joseph Alden on a check signed by Joseph Alden as the Treasurer of Enesco Federal Credit Union. [R. 31-32.] The name of Enesco Federal Credit Union was printed at the top of the check and at the bottom under the line on which Joseph Alden signed his signature was printed the word "Treasurer." For convenient reference, a photostat of the check is embodied in this brief.

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*"The bond and its four riders were attached to the appellant's Amended Complaint and their existence was admitted by the appellee's pleadings, so they did not go into evidence as exhibits. In printing the original record, there was an omission in failing to include these exhibits to the Amended Complaint, they were later inserted in the record at pages 12-A to 12-D."

TO TORRANCE NATIONAL BANK
1329 SARTORI AVENUE
TORRANCE, CALIFORNIA

90-800
1222

Enesco Federal Credit Union

1524 BORDER AVENUE . . TORRANCE, CALIFORNIA

TELEPHONES:
TORRANCE 111
L.A.-NEVADA 6-1701
EXT. 425

CHARTER 2228

APRIL 3, 195[illegible]
VOID AFTER 60 DAYS

$ **30,000.00**

1505 S.W.

PAY TO THE ORDER OF TORRANCE NATIONAL BANK

PA $30000 DOLS 00 CTS

KNOW YOUR ENDORSER
REQUIRE IDENTIFICATION

Joseph R Alden
ASST TREASURER

The trial court found that Joseph Alden had been at all times the Secretary-Treasurer and General Manager of Enesco Federal Credit Union. [R. 31.] It also found that Joseph Alden "signed the said check as Secretary of Enesco Federal Credit Union." [R. 31.] It found that when Joseph Alden presented the check to appellant after banking hours on April 2, 1953, appellant had paid him the $30,000.00 in currency called for. [R. 32.] It found that the cashing of this check was in accordance with a long established practice by which Joseph Alden would, on Thursday of each week after the close of business by appellant, bring to appellant a check drawn on Enesco Federal Credit Union's account signed by Joseph Alden as Secretary of Enesco Federal Credit Union, and that he would exchange the check for currency in an amount equal to the face amount of the check. [R. 32.] It found that he used the currency which he would receive on each occasion to cash payroll checks for employees of National Supply Company, the employees of which had formed the said Enesco Federal Credit Union. [R. 32.] The court then found that Enesco Federal Credit Union had not authorized the use of any of its funds to carry on the check cashing operations of Joseph Alden, and that Joseph Alden had carried on the check cashing operations on premises assigned to Enesco Federal Credit Union at National Supply Company's plant in Torrance, and that Joseph Alden had made a charge for the cashing of such payroll checks which was kept by him because he was carrying on this check cashing operation for his own personal gain. [R. 33.]

The court then makes a somewhat ambiguous finding to the effect "that the plaintiff bank knew the purpose for which the currency so secured by said Joseph Alden was being used, but did not know that the said Joseph

Alden lacked authority to so use the funds; . . ." [R. 33.] It is not quite clear from this finding whether the trial court intended to find that the appellant knew that Joseph Alden was using the funds for the purpose of cashing checks in connection with his employment by Enesco Federal Credit Union, or whether appellant knew that he was actually using the funds for his own private business operation of cashing checks.

The trial court then found that the appellant would hold each of the weekly checks which it received without processing them through its books and records until the Monday following the presentation of the same, and that on Monday Joseph Alden would deposit the checks which he had cashed to an account which he maintained with appellant under the name of Enesco Service Fund, and would then write a check on Enesco Service Fund payable to plaintiff in an amount sufficient to cover the check. [R. 33.] It found that by this means appellant's records did not reflect these withdrawals and repayments on the Enesco Federal Credit Union ledger. [R. 33.] It found that on April 2, 1953, when the particular check involved in this action was presented, that Enesco Federal Credit Union had only a balance in its account of $10,483.07. [R. 31.] The court then found that after receiving the money on April 2, 1953, and while returning to his place of business, Joseph Alden was robbed of the $30,000.00 in currency which he had received, and that appellant had thereupon instituted an action in the State Superior Court against Enesco Federal Credit Union to recover the balance on the $30,000.00 check, but that such case was decided adversely to appellant, and is reported in 134 Cal. App. 2d 316. [R. 34.]

The court then found that there was a controversy between the parties, in that appellant contended that ap-

pellee was obligated under its rider to reimburse appellant for the amount of its loss up to the limits specified in such rider, that is, up to $10,000.00, and that the appellee disputed such contention. [R. 34-35.] The trial court then concluded that the appellee was correct in its position in that the check was not a forged instrument within the meaning of the rider or the law of the State of California, and that appellant had "suffered no loss through the accepting, cashing or paying of any forged check or instrument, or for any other cause which is covered by" the bond or any of its riders, and that, therefore, appellant was not entitled to any recovery, but the appellee was entitled to a decree to the effect that it had no liability under the bond or any of the riders. [R. 35-36.]

The findings of fact are generally in accord with the evidence, except in the following particulars:

1. The evidence showed that Joseph Alden would reimburse appellant for the moneys which it paid out on each of these checks on the Friday following the Thursday that he received the money, instead of on Monday as found by the court. [R. 47-48.]

2. If the court intended to find by the previously mentioned ambiguous finding that appellant knew that Joseph Alden was using the moneys which he would receive in a personal business of his own as distinguished from the business of Enesco Federal Credit Union, then such a finding would not be supported by the evidence, as there is no evidence to show that the appellant knew that the check cashing operation was a personal business of Joseph Alden, as distinguished from Enesco Federal Credit Union. Even though there was evidence to support a finding that some officer or employee of appellant knew that Joseph Alden was using the proceeds of these checks

in his personal check cashing business, we do not believe that this would exonerate the appellee under its bond, and we will deal with the legal phases of this under a separate subdivision of this brief.

Several years prior, this check cashing activity was conducted by Joseph Alden as part of the business of Enesco Federal Credit Union for the convenience of its members, but it had been directed by a Federal Examiner to discontinue that operation as not being one of the operations permitted by the law relating to these associations. [R. 97-98.] Thereupon, the Directors of Enesco Federal Credit Union permitted Joseph Alden to continue the check cashing operations on the premises, provided that he supplied his own financing of the moneys necessary to carry on such operation. [R. 91, 92 and 98.] Joseph Alden had represented to these Directors that he had made financial arrangements with the appellant bank under which he had become a bonded messenger of appellant bank in utilizing its moneys in these activities. [R. 91 and 98.] This statement was untrue and Joseph Alden had not made any other or different arrangement with appellant bank for the cashing of checks, except that in order to conceal from his employer the fact that he was using its checks to obtain the currency needed to cash the payroll checks, he had caused to be printed a series of unnumbered checks showing the name Enesco Federal Credit Union. [R. 98.]

By the use of such unnumbered checks and the exchanging of the payroll checks on Friday for the check which

he customarily left at the bank on Thursday, he was able to avoid detection as no entries of the transactions were made on the bank ledgers with respect to the account of Enesco Federal Credit Union, or in the record of Enesco Federal Credit Union. At the same time, the appellant bank continued to believe that the check cashing operation was still an activity of Enesco Federal Credit Union as it had been in the original instance. [R. 101 and 102.]

Pending the determination of the action in the State Courts against Enesco Federal Credit Union the within action remained dormant by stipulation of the parties, with the approval of the District Court, because if appellant had been successful in recovering its loss from Enesco Federal Credit Union there would have been no purpose in going forward with the present action against appellee. When the District Court of Appeal decision became final, this declaratory relief action was again activated and brought on for trial on November 28, 1956. The case was finished on that date and taken under submission by the trial court. On March 28, 1957, the trial court filed a memorandum decision directing that a judgment be entered in favor of the appellee on the ground that the signing by Joseph Alden of his own name as Treasurer of Enesco Federal Credit Union was not a forgery, even though Joseph Alden lacked authority to sign the check on behalf of Enesco Federal Credit Union. [R. 21-27.] The court held that he did lack authority to sign such check, but it failed to apply the existing law of the State of California with respect to what constitutes

a forgery. Instead, it applied the doctrine of a case decided in 1896 before the present Section 470 of the California Penal Code had been amended to include within the definition of forgery, the signing without authority.

The court also relied upon another decision which did not even involve the signing of a document without authority, and, of course, in reaching that decision the trial court not only ignored the existing statutory law, but it refused to follow the numerous decisions in California holding that the signing without authority constitutes forgery. The court recognized that the matter was to be resolved by the definition of forgery under the laws of the State of California. It recognized that *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, was applicable to the substantive law.*

Appellant's Specification of Errors.

The errors of the District Court may be summarized as follows:

1. The basic error was the District Court's determination that the signing by Joseph Alden of the $30,000.00 check as Treasurer of Enesco Federal Credit Union was

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*In doing this, the court, nevertheless, misstated the position of appellant's counsel with respect to *Erie Railroad Co. v. Tompkins.* Apparently the trial court had observed in one of the earlier briefs which had been filed in opposition to a motion of appellee to dismiss, a statement that *Erie Railroad Co. v. Tompkins* did not apply to procedural matters and that the federal declaratory relief statutes governed the procedure as distinguished from the state declaratory relief statute. This is the only point for which appellant's counsel had cited the case of *Erie Railroad Co. v. Tompkins,* and there never was any contention by any counsel during the trial of the case that the state substantive law with respect to forgery was not applicable. On the contrary, this was assumed by all parties.

not a forgery for the reason that the signing in behalf of another party without authority was not a forgery under the law of California.

2. If the District Court, by its ambiguous finding, intended to find that appellant knew that Joseph Alden was using the moneys which he obtained from appellant in connection with his personal check cashing business, then such finding is not supported by the evidence.

3. Even though there was evidence to sustain a finding that appellant knew that the checks were being cashed for Joseph Alden's personal use, this would not exonerate appellee under its bond and the Court erred in making any contrary determination.

4. The District Court erred in finding that Joseph Alden would redeem his check on the Monday following the Friday that he obtained the currency. The evidence conclusively shows that he did this on Friday following Thursday. While this error appears to have had no effect in causing the erroneous determination of the Court, we, nevertheless, mention it in the event it should be urged that this difference in time had any significance.

Statement of Questions of Law Involved.

There are two questions of law involved in this case, although the trial court in its memorandum decision seems to have overlooked one of these. These questions of law are as follows:

1. Where a party signs a check as agent for a principal when he has no authority to sign such check, does

that constitute a forgery? In other words, does the signing without authority constitute a forgery?

2. Assuming that an agent has general powers to sign checks on his employer's bank account in connection with the activities and business of the employer, is it a forgery where an agent signs a check on the employer's account for the purpose of obtaining funds for the agent's personal use? It was this latter question which the trial court seems to have overlooked in its memorandum decision, although this appeared to be the sole question when the matter was orally argued at the conclusion of the trial on November 28, 1957. [R. 111-119.]

3. Did not the District Court err in relying upon a decision which involved forgery committed before the amendment to Section 470 of the Penal Code, which amendment made the signing without authority a forgery?

4. Did not the District Court err in failing to apply the rule that if there was any uncertainty in the meaning of the bond, such uncertainty should have been resolved against the appellee who drafted the bond?

5. Would the appellee be excused from liability if an officer of appellant had known that Joseph Alden intended to misappropriate the moneys which he received from the forged check?

ARGUMENT.

I.

The Signing by Joseph Alden of the $30,000.00 Check as Treasurer of Enesco Federal Credit Union Was a Signing Without Authority, and, Therefore, a Forgery Within the Meaning of Appellee's Bond and the Law of the State of California.

We have already quoted the full language of the rider in an earlier portion of this brief. The applicable portions of the rider are as follows:

> "Any loss (1) through . . ., cashing or paying forged . . . checks, . . ., or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, . . . or (3) through . . . paying, or delivering any funds . . . or establishing any credit or giving any value on the faith of any written instructions or advices, directed to the Insured, authorizing . . . payment, delivery or receipt of funds . . . which instructions . . . purport to have been signed or endorsed by any customer of the Insured . . . but which instructions . . . bear the forged signature . . ."

The language is extremely broad. The only requirement for liability is that the check or document be forged. There is no definition of forgery in the bond, so we must look to the law of California, where the bond was issued, for a definition of "forgery." Applicable statutes are read into the contract as fully as though they had been expressly embodied therein.

See:

Gally v. Wynne, 96 Cal. App. 145 at 148;

Marshal v. Wentz, 28 Cal. App. 540 at 542;

Thomas v. Wentworth Hotel Co., 158 Cal. 275 at 280;

People v. N. Y. Indemnity Co., 113 Cal. App. 487 at 490;

People v. Page, 100 Cal. App. 252 at 254.

Forgery is defined in Section 470 of the California Penal Code. The applicable language of that section is as follows:

> "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any . . . check . . . or request for the payment of money, . . . is guilty of forgery."

There are many decisions in California which state the rule that the signing without authority constitutes a forgery.

See:

People v. Rushing, 130 Cal. 449 at 451, *et seq.;*

Keikhoefer v. U. S. Nat. Bank, 2 Cal. 2d 98 at 108;

People v. McKenna, 11 Cal. 2d 327 at 332;

People v. Caldwell, 55 Cal. App. 2d 238 at 245;

People v. McPherson, 6 Cal. App. 266 at 269.

The trial court in its Memorandum of Decision mentioned the cases of *People v. McKenna* and *People v. McPherson* (*supra*), but it sought to distinguish them by stating that they were "substantially different in that defendant actually signed the name of another without authority, instead of, as in the case now being decided, signing his own name for an unauthorized purpose."

It would be unfortunate if a forgery turned upon any such an artificial distinction. There are at least two ways in which a purported agent who is acting without authority can forge a check or other instrument. The following are examples:

1. *Signing only the purported principal's name. The* agent, John Doe, can merely sign the name of his purported principal, Richard Roe, without signing his own name at all. This was the type of forgery involved in the case of *People v. McPherson,* 6 Cal. App. 266, and *People v. Caldwell,* 55 Cal. App. 2d 238.

In *People v. McPherson, supra,* the defendant had merely written the name of another to the instrument, and the court in holding that this constituted a forgery, said at page 269:

> "The information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed."

In *People v. Caldwell, supra,* the defendant Caldwell had affixed the name of Williams to certain insurance policies which he had no authority to issue in behalf of the insurer to the insured. It does not appear from the opinion whether the name was affixed by typewriting or by handwriting. Caldwell had retained the premiums which he had received from the insured on account of these policies. One of Caldwell's defenses was that an old authorization which he had was still in effect, but the court held that even if such old authorization had continued to exist, it would not constitute a defense, and in this connection the court said at page 245:

> "A further answer to such argument is that the authority to sign instruments executed in the pur-

> suit of lawful transactions could imply no more than for appellant to sign certificates after he had first placed the required insurance with Lloyd's underwriters. Since no insurance was ever placed, as we shall presently see, there arose no occasion for the exercise of such authority if it had continued to 1940. *Neither can it be said that any authority could have been implied for appellant to do a criminal act unless it had been first established that the two had conspired together to commit such crime.*" (Italics ours.)

In the last sentence of the above quoted language, the court says that even though Caldwell did have authority to sign policies, such authority did not include the signing of policies where Caldwell never intended to remit the premiums to the insurer, but intended to retain them himself. The case differs only in that it involved forged insurance policies, whereas we are concerned with a forged check.

2. *The agent's signing of his own name below the typewritten, printed or handwritten name of the purported principal.* The purported agent can sign his name in an agency capacity below the name of the purported principal. Whether this principal's name has been printed, typewritten or signed on the instrument should make no difference in determining whether there is a forgery. In each instance the fact that the agent has signed his name below indicates that he is purporting to act as the principal's representative. Such a method shows that the name of the principal was not written by the principal, otherwise there would be no purpose at all in the agent writing his name below.

The case of *People v. Rushing,* 130 Cal. 449, deals with a situation where one of the forged documents, a

check, was signed "E. Geddes, by his attorney in fact, W. E. Rushing." In that case one Edwin Geddes had an account in a bank which later went into liquidation. The account was evidenced by a bank book showing it to be carried in the name of E. Geddes. Upon the suspension of the bank's activities, Geddes assigned this account to the First National Bank of Fresno for collection. The defendant then procured a general power of attorney from a totally different E. Geddes and sold the account evidenced by the above mentioned bank book to one Levy. The check of Levy was drawn payable to the order of E. Geddes. The defendant took the check to the bank and cashed it after endorsing it "E. Geddes, by his attorney in fact, W. E. Rushing." Among the questions raised was whether the power of attorney which the defendant used to defraud Levy by inducing him to purchase the account which the defendant did not own, and which the E. Geddes who signed the power of attorney did not own, had committed a forgery. The defendant contended that since the name of the man signing the power of attorney was actually E. Geddes, that there was no forgery, but in answer to this the court said at page 452:

> "We do not so understand the law. Every person who, with intent to defraud another, falsely makes, utters or publishes a power of attorney, knowing the same to be false or forged, is guilty of forgery. (Pen. Code, Sec. 470.)
>
> "A man may be guilty of forgery by making a false deed or instrument in his own name, if the name was placed upon the instrument with the fraudulent intent of throwing the *onus* of the obligation upon another, and of making the writing purport to be the writing of another. A man who forges another's name cannot excuse himself upon the ground

that the name happened to be identical with his own. (2 Bishop's New Criminal Law, Sec. 587; 2 Russell on Crimes, 9th ed., 718 et seq.; People v. Peacock, 6 Cow. 72; Barfield v. State, 29 Ga. 127.) Because the initial of Elmer Geddes' name is 'E', he will not be allowed to forge the name of every other Geddes in the state whose initial might be 'E', and in defense claim that he was only signing his own name. If the power of attorney was made and signed by Elmer Geddes for the fraudulent purpose of getting the money of Edwin Geddes, which was on deposit in the bank, and if defendant knew all these facts and uttered the power of attorney for the purpose of making the sale to Levy, knowing that Levy believed it to be the power of attorney of Edwin Geddes, he committed the crime of forgery."

The forgery involved in the case at bar falls within this second category, except that instead of Enesco Federal Credit Union's name being printed or typed on the check immediately above Joseph Alden's signature as Treasurer, Enesco Federal Credit Union's name is printed at the top of the check so as to indicate that it is a check of Enesco Federal Credit Union. Then, under the line on which Joseph Alden signed, there was printed the word "Treasurer." It would not seem that the failure of the forger to sign his name immediately under that of his purported principal should have any effect upon the forgery.

It is apparent from the above decisions that the signing by Joseph Alden of the check was a forgery, as fully as though he had merely written the name "Enesco Federal Credit Union" on the check. The fact that he used a check that had Enesco Federal Credit Union's name printed on it so as to render it unnecessary for him to write that name on the check, does not alter the situation.

II.

Where an Agent Authorized to Sign on His Principal's Account Does so for the Purpose of Obtaining Moneys for His Personal Use, This Constitutes a Forgery.

The fact that the agent was authorized to sign on the account does not mitigate the act insofar as its being a forgery is concerned where he uses the check for the purpose of obtaining proceeds for his personal use. The case of *People v. Caldwell,* 55 Cal. App. 2d 238, points this out in holding that such an authorization does not constitute authority to sign checks to obtain money for the agent's personal unauthorized use.

There are many other decisions laying down the same rule as that applied in *People v. Caldwell, supra.* In *State v. Sotak,* 100 W. Va. 652, 131 S. E. 706, the court states the rule at page 708 as follows:

> "But there is an abundance of authority that an agent may commit forgery by making or signing an instrument in disobedience to his instructions or in the improper exercise of his authority. Ex parte Hibbs (D. C.), 26 Fed. 421; Moore v. Com., 92 Ky. 630, 18 S. W. 833; People v. Dickie, 62 Hun. 400, 17 N. Y. Supp. 51; Flower v. Shaw, 2 Car. & K. 703; Merchants Bank & T. Co. v. People's Bank, supra."

See also:

Quick Service Box Co. v. St. Paul Mercury Indem. Co. (7th Cir.), 95 F. 2d 15 at 17;

Yeager v. United States (C. C. A. Dist. of Col.), 32 F. 2d 402, and other cases cited therein.

When a principal authorizes his agent to sign checks he does not authorize the use of such checks for the agent's

personal business. The authority is not an unlimited one permitting the agent to distribute the employer's funds around at the agent's pleasure. Whenever the agent goes beyond the principal's authorization and, instead of signing checks for the purposes authorized by the principal, signs them to obtain funds for himself or for his friends it is an "unauthorized" signing and a forgery just as much as though there had never been any agency relation at all.

We are not dealing with a situation where ostensible agency has any application at all. That doctrine applies only where the principal has held the agent out to third parties as having general powers, and such third parties have no actual knowledge that the agent is using the funds for his personal use.

> "A common example of ostensible authority arises when a principal puts his agent in charge of a business as the apparent manager. In such a case, the agent is clothed with ostensible authority to do all things essential to the ordinary conduct of the business at that place, and third persons, acting in good faith and without notice of, or any reason to suspect, any limitations on the manager's authority, are entitled to rely on appearances."
>
> 2 Cal. Jur. 2d, Agency, p. 703.

Appellee is not such a third party as is entitled to invoke the doctrine of ostensible agency. The third party who would have been able to benefit by such doctrine was appellant who cashed the checks believing that Alden was using their proceeds in connection with the business of his principal. Even then the District Court of Appeal

denied appellant the advantages of such a rule in *Torrance National Bank v. Enesco Federal Credit Union,* 134 Cal. App. 2d 316. There is much less reason why an insurer such as appellee should be permitted to escape liability because the forgery was committed by an agent who intentionally exceeded his authority instead of by one who had no authority at all.

The contract liability of appellee under its bond should not turn upon whether the wrong arose from a purposeful excess of authority, or whether it arose from an assumption of authority where there was no authority of any kind.

Before proceeding to another subject, it should be again noted that Section 470 of the Penal Code, in defining forgery, includes the signing of the name of another person by one, "knowing that he has no authority so to do."

It is clear from the evidence and from the findings of fact that Joseph Alden did not have authority to draw upon Enesco's bank account in order to obtain funds for his personal use. [R. 32.] Two officers of Enesco Federal Credit Union testified that Joseph Alden had been specifically instructed that he could continue the check cashing business as his own, provided that he could make some arrangement for the financing of that business. These instructions were given him after Enesco Federal Credit Union had been required to discontinue that business as its own by the Federal Examiner. [R. 88-99.]

III.

The District Court Erroneously Relied Upon Authorities Which Were Either Not in Point, or Which Were Decided Prior to the Amendment to Section 470 of the Penal Code, Making Signing Without Authority a Forgery.

The court in its memorandum decision, relied particularly upon the case of *People v. Bendit,* 111 Cal. 274, in support of its ruling that the signing of the name of another without authority was not a forgery. That case was decided in 1896, at which time Section 470 of the Penal Code did not include in the definition of forgery the signing of another's name without authority. For the convenience of the court we are including in the appendix of this brief a copy of that section as it existed at the time that the decision in the case of *People v. Bendit* was made.

In 1905 Section 470 of the Penal Code was amended so as to include the signing without authority. (Calif. Stats., 1905, p. 673.)

Having erroneously assumed that the rule of *People v. Bendit* is still the law of this state, the court proceeded to misinterpret a later case in California which did not even involve a situation where a person had signed the name of another without authorization. That was the case of *Pasadena Investment Co. v. Peerless Casualty Co.,* 132 Cal. App. 2d 328. In that case the defendant Nilsson had been doing business under the fictitious name of Haveles Manufacturing Company. He signed that name to certain fictitious invoices which he, in turn, sold to Pasadena Investment Co. on the basis that they were genuine invoices representing sales. Pasadena Investment Co. filed suit to recover against Peerless Casualty

Co. on its forgery bond, and contended that since the invoices were fictitious, in that they did not represent actual sales at all, that they were forged documents which gave rise to a right to recover on the forgery bond. There was no question of agency involved in that case at all. The matter of signing the name of someone else without authority was not even before the court. Unfortunately, the court in that case in quoting from the case of *People v. Bendit* for the purpose of showing that a fictitious or false instrument was not necessarily a forgery, included in the quoted language the statement that the signing of another's name without authority was not a forgery, however, in order to illustrate that the court was not attempting to adopt such a rule in the Pasadena Investment Co. case, the court immediately thereafter quoted from *People v. McKenna,* 11 Cal. 2d 327 at 332, as follows:

> " 'The crime of forgery consists either in the false making or alteration of a document *without authority* or the uttering (making use) of such a document with the intent to defraud.' " (Italics ours.)

If the court had intended to lay down a rule that signing without authority could not be a forgery, it would have either attempted to distinguish the case of *People v. McKenna, supra,* or it would not have quoted it at all. The court in that case was aware of the fact that it did not have that particular issue before it at all, and that the only issue which it had was whether the signing of a false or fictitious document was a forgery. The specific holding of the court is set forth at page 331, as follows:

> "The invoices and receipts, alleged by the complaint in the instant action to have been forged, appear from the other allegations of the complaint to have been made by the parties purporting to have

made them. They are not forgeries. Such invoices and receipts not being forgeries, the alleged acts of the Nilssons in using them to evidence accounts receivable sold by them to Pasadena do not constitute forgeries."

IV.

The District Court Erred in Failing to Apply the Rule That if There Was Any Uncertainty in the Meaning of the Bond, It Should Have Been Resolved Against the Appellee Who Drafted the Bond.

We have already quoted the applicable language from the rider to demonstrate that it covers every conceivable type of forgery. We have shown that the type of forgery inolved in this case is specifically covered by the statutory definition of forgery in Section 470 of the Penal Code, and we have also shown that the courts of the state of California have held that signing without authority is a forgery. Even though there was any doubt about the bond being sufficient to cover a forgery, which we believe there was not, the District Court should have construed the rider liberally in favor of the contention urged by appellant, instead of construing it liberally in favor of appellee insurer.

This rule is stated in 27 Cal. Jur. 2d, Insurance, Section 276, at page 773, as follows:

> "The statement that insurance policies are to be liberally construed in favor of the insured, and most strictly against the insurer, is rarely made in this unqualified form. But propositions to that effect are recurrent in judicial opinions dealing with insurance cases. Foremost among them is the rule that since an insurance policy is drawn by the insurer, and since the insurer is bound to use such language as to make

the provisions of the contract clear to the ordinary mind, any ambiguity, uncertainty, or reasonable doubt is to be resolved by a construction in favor of the insured, or of the beneficiary claiming under the policy. Another frequent expression of the rule is that where the language is reasonably susceptible of two constructions, it should be construed in favor of the insured. A similar statement often made is that an insurance policy must be so construed, if fairly warranted, as best to carry out the object of securing indemnity to the insured for losses to which the insurance relates, rather than to narrow the protection of the policy."

In *Provident Trust Co. v. National Surety Co.,* 44 Fed. Supp. 514, the court stated the same rule at page 515, as follows:

"In Sidebothom v. Metropolitan Life Insurance Company, 39 Pa. 124, 127, 14 A. 2d 131, 132, it is stated: 'It is true that there is a generally accepted rule of construction that, where doubt exists as to its meaning, an insurance policy, couched in language chosen by the insurer, is to be given the construction of which it is susceptible most favorable to the insured . . .' See Morris v. American Liability & Surety Company, 322 Pa. 91, 185 A. 201; Stroehmann et al. v. Mutual Life Insurance Company of New York, 300 U. S. 435, 57 S. Ct. 607, 81 L. Ed. 732."

V.

Even Though a Representative of Appellant Had Known That Joseph Alden Was Using the Moneys for His Personal Check Cashing Business, This Would Not Defeat Appellant's Right to Recover on the Forgery Bond.

We have already noted the District Court's finding to the effect that the appellant knew the purpose for which the currency was being used by Joseph Alden, but that it "did not know that the said Joseph Alden lacked authority to so use the funds." [R. 33.] One reason that this finding is ambiguous is that it does not take into consideration the law with respect to an agent using his principal's funds. The rule is well established that a corporate employee or officer cannot utilize corporate funds for his own personal ventures. (13 Cal. Jur. 2d, Corporations, p. 121, *et seq.*) In this instance the law with respect to federal credit unions precluded Joseph Alden from borrowing any such sums, even though he had been one of its shareholders.

The absolute limit on any loans is a maximum of $400.00. See Section 1757, Title 12, U. S. C. A., specifying powers of federal credit unions; and Section 1761(d) specifying limitation of loans.

The finding is discordant in that it purports to cloth appellant with a mantle of innocence by not knowing that Joseph Alden lacked authority to use the funds, yet at the same time, the legal limitations on the right of any officer, agent, or shareholder to use funds of Enesco Federal Credit Union would have to be known by appellant because knowledge of Joseph Alden's improper use of the moneys would be conclusively imputed to appellant.

In *Hays v. Bank of America,* 71 Cal. App. 2d 301, the court in stating the rule with respect to parties dealing with knowledge of the law, said at page 304:

> "We must assume the parties to the contracts of employment knew of the existence of the Fair Labor Standards Act and took into consideration its provisions applicable to hours of work and compensation for overtime service."

In referring to the imputed knowledge of the legislation relating to gold coin, the court in *Security-First Nat. Bk. v. De La Cuesta,* 15 Cal. App. 2d 302, said at page 304:

> "All persons are conclusively presumed to have known these facts and to have been able to construe the notice of sale accordingly."

See also:

Central Pacific Ry. Co. v. Droge, 171 Cal. 32 at 42;

Estate of Carroll, 138 Cal. App. 2d 363 at 365.

Even assuming that some representative of appellant did have knowledge that Joseph Alden was using the proceeds of these checks in connection with his personal business, that would not constitute a basis upon which appellee could escape liability under its bond. This is true for two reasons. The first is that neither the bond nor any of the riders thereto contain any provision which would exonerate the appellee merely because an officer or representative of appellant knew that the money was being paid to Joseph Alden for unlawful or improper purposes.

In fact, the primary purpose of the bond was to insure appellant against losses resulting from dishonesty of appellant's own employees. This type of loss is covered under the very first paragraph of the bond which insured

appellant against liability up to the extent of $125,000.00 against any loss "through any dishonest act, wherever committed, of any of the employees, as defined in Section 6 hereof, whether acting alone or in collusion with others." Section 6 contains no provisions which would qualify the scope of this coverage. The rider which covered forgeries by persons other than employees limited appellee's liability to $10,000.00. To emphasize the fact that it was not intended to diminish appellee's liability through losses of moneys through dishonest acts of employees, this rider contained the following provision:

> "it being understood, however, that such liability shall be a part of and not in addition to the amount of the attached bond and that such limitation of amount shall not apply to any loss or losses in which dishonesty on the part of any of the Employees is involved; . . ."

The dilemma facing appellee is that if appellee contends it has no liability under the forgery clause in the rider because of knowledge or collusion on the part of any employee of appellant, then instead of escaping liability, appellee would render itself liable to the full amount of appellant's loss of $30,000.00, instead of to the limited amount of $10,000.00 as specified under the forgery clause.

The second reason that knowledge on the part of any employee of appellant of Joseph Alden's wrongdoing would not exonerate appellee, is that the decisions hold to the contrary.

In *Massachusetts Bonding & Ins. Co. v. Hudspeth* (8th Cir.), 94 F. 2d 467, the court in affirming a judgment

against the bonding company, held that knowledge on the part of the president of the wrongdoing did not prevent the bank from recovering. In this connection the court said at page 471:

> "It is further contended that the employer had knowledge of, and therefore consented to, the appropriation of these funds. This is based upon the assumption that Griffin must have received the money, and that Keith, the manager, knew the method employed by the bank and Mrs. Hord in paying Griffin's checks. The knowledge of Griffin, however, could not be imputed to the corporation nor to the court, because he was a party to the fraud. American Surety Co. v. Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. Ed. 977; Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. 1193. The bond contains provision that, 'If the Employer be a corporation, the act or knowledge of any officer or director thereof, not in collusion with such defaulting Employee, shall be deemed the act or knowledge of the Employer within the meaning hereof.' This contractual exception prevents Griffin's guilty knowledge from being imputed to the corporation, and, even without it, it would not be charged with notice where he was acting for his own benefit, or was a party to the fraud. Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co., 10 Cir., 83 F. 2d 14, 105 A. L. R. 529. The provision imputing to the corporation knowledge of an officer would not include such knowledge as Keith may have had."

See also:

U. S. Fidelity & Guaranty Co. v. Walker (C. A. 5th), 248 Fed. 42 at 44;

American Surety Co. v. State, 76 Ind. App. 260, 127 N. E. 844 at 846;

Roosevelt Trust Co. v. American Surety Co. of N. Y., 91 N. J. L. 588, 103 Atl. 182 at 183;

Fiala v. Ainsworth, 63 Neb. 1, 88 N. W. 135 at 137;

Rankin v. Bush, 108 App. Div. 295, 95 N. Y. Supp. 718;

Nashville & American Trust Co. v. Aetna Cas. & Surety Co., 21 Tenn. App. 366, 110 S. W. 2d 1041;

Peurifoy v. Loyal, 154 S. C. 267, 151 S. E. 579 at 587; and

U. S. Fidelity & Guaranty Co. v. Bank of Thorsby (C. A. 5th), 40 F. 2d 950.

Conclusion.

A definition of forgery which turned upon whether the forger signed as a purported agent for a third party, or whether he merely signed the third party's name would be an artificial one. In both instances the result is the same, in that the forger obtains money to which he has no right to the damage of the party paying the money. The only difference is that in one instance the victim pays him the money because he mistakenly believes him to be the party whose name is forged, whereas, in the other instance the victim pays him the money because he erroneouly believes that the forger has authority to sign the other party's name. The mistake is just as costly in either case, and it is generated by the false representations of the forger in each instance.

The legislative policy in making an unauthorized signing a forgery is not open to question in any event.

It has clearly expressed this policy in the statute, and the decisions of the California courts have uniformly recognized this as constituting the law ever since the amendment to the statute in 1905.

For these reasons we do not believe that the decision of the District Court should be permitted to stand.

Respectfully submitted,

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APPENDIX.

The Following Is a Quotation of Section 470 of the Penal Code When It Was Adopted in 1872, and as It Existed When the Case of People v. Bendit, 111 Cal. 274, Was Decided.

"Every person who, with intent to defraud another, falsely makes, alters, forgoes, or counterfeits any charter, letters, patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any Controller's warrant for the payment of money at the Treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts

to pass, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a Court, or the return of any officer to any process of any Court, is guilty of forgery."